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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

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DELILAH MAY JOHNSON,)
Plaintiff,) No. CV-07-5035-CI
v.) ORDER GRANTING PLAINTIFF'S
MICHAEL J. ASTRUE, Commissioner) MOTION FOR SUMMARY JUDGMENT
of Social Security,) AND REMANDING FOR ADDITIONAL
Defendant.) PROCEEDINGS
)

Before the court are cross-Motions for Summary Judgment. (Ct. Recs. 15, 20.) Attorney Thomas Bothwell represents the Plaintiff. Special Assistant United States Attorney Joanne Antonio represents the Defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 6.) After reviewing the administrative record and briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment and remands the matter to the Commissioner for additional proceedings pursuant to sentence four 42 U.S.C. 405(g).

JURISDICTION

Delilah Johnson, Plaintiff, protectively filed for Supplemental Security Income benefits on July 20, 2004. (Tr. 72.) She alleged disability due to depression, anxiety, diabetes, high blood pressure, asthma, headaches, obesity, GERD, and back pain, with an alleged onset date of April 1, 2004. (Tr. 46, 65.) Her application was denied both initially and upon reconsideration. (Tr. 27-28.)

1 She timely requested a hearing, which was held on May 22, 2006,
 2 before Administrative Law Judge (ALJ) R. J. Payne. (Tr. 29, 282-
 3 320.) Plaintiff, who was represented by counsel, and medical expert
 4 Joselyn Baily, M.D., testified at the hearing. The ALJ denied
 5 Plaintiff's application and the Appeals Council denied review,
 6 making the ALJ's decision the final decision of the Commissioner.
 7 (Tr. 5-8.) The instant matter is before the district court pursuant
 8 to 42 U.S.C. § 405(g).

9 STANDARD OF REVIEW

10 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
 11 court set out the standard of review:

12 A district court's order upholding the Commissioner's
 13 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,
 14 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the
 15 Commissioner may be reversed only if it is not supported
 16 by substantial evidence or if it is based on legal error.
Tackett v. Apfel, 180 F.3d 1094, 1097 (9th Cir. 1999).
 17 Substantial evidence is defined as being more than a mere
 18 scintilla, but less than a preponderance. *Id.* at 1098. Put
 19 another way, substantial evidence is such relevant
 20 evidence as a reasonable mind might accept as adequate to
 support a conclusion. *Richardson v. Perales*, 402 U.S.
 21 389, 401 (1971). If the evidence is susceptible to more
 22 than one rational interpretation, the court may not
 23 substitute its judgment for that of the Commissioner.
Tackett, 180 F.3d at 1097; *Morgan v. Commissioner of
 24 Social. Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

25 The ALJ is responsible for determining credibility,
 26 resolving conflicts in medical testimony, and resolving
 27 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
 28 Cir. 1995). The ALJ's determinations of law are reviewed
de novo, although deference is owed to a reasonable
 construction of the applicable statutes. *McNatt v. Apfel*,
 201 F.3d 1084, 1087 (9th Cir. 2000).

25 SEQUENTIAL EVALUATION

26 The Social Security Act defines "disability" as the "inability
 27 to engage in any substantial gainful activity by reason of any
 28 medically determinable physical or mental impairment which can be

1 expected to result in death or which has lasted or can be expected
 2 to last for a continuous period of not less than 12 months." 42
 3 U.S.C. § 423(d)(1)(A). The Commissioner is governed by a five-step
 4 sequential evaluation process for determining whether a plaintiff is
 5 disabled. 20 C.F.R. §§ 404.1520, 416.920, *Bowen v. Yuckert*, 482
 6 U.S. 137, 140-42 (1987). As explained by the court in *Edlund*:

7 In evaluating whether a claimant suffers from a
 8 disability, an ALJ must apply a five-step sequential
 9 inquiry addressing both components of the definition,
 10 until a question is answered affirmatively or negatively
 11 in such a way that an ultimate determination can be made.
 12 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The
 13 claimant bears the burden of proving that [s]he is
 14 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.
 15 1999). This requires the presentation of "complete and
 16 detailed objective medical reports of h[is] condition from
 17 licensed medical professionals." *Id.* (citing 20 C.F.R. §§
 18 404.1512(a)-(b), 404.1513(d)).

19 *Edlund*, 253 F.3d at 1156-1157.

20 The initial burden of proof rests upon the claimant to
 21 establish a *prima facie* case of entitlement to disability benefits.
 22 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971). This burden
 23 is met once a claimant establishes that a physical or mental
 24 impairment prevents her from engaging in her previous occupation.
 25 In steps one through four, a claimant must demonstrate a severe
 26 impairment and an inability to perform past work. *Erickson v.*
Shalala, 9 F.3d 813, 816-17 (9th Cir. 1993). If a claimant meets
 27 those requirements, the burden shifts to the Commissioner to
 28 demonstrate a claimant can engage in other types of substantial
 gainful work which exist in the national economy. *Id.* at 817
 (citing *Gallant v. Heckler*, 753 F.2d 1450, 1452 (9th Cir. 1984)).
 To make this determination, the Commissioner must consider a
 claimant's age, education, and work experience. 20 C.F.R. §

1 404.1520(a)(v). See *Bowen v. Yuckert*, 482 U.S. 137, 107 S.Ct. 2287
2 (1987).

3 It is the role of the trier of fact, not this court, to resolve
4 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
5 supports more than one rational impairment, the court may not
6 substitute its judgment for that of the Commissioner. *Tackett*, 180
7 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
8 If there is substantial evidence to support the administrative
9 findings, or if there is conflicting evidence that will support a
10 finding of either disability or non-disability, the finding of the
11 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
12 1230 (9th Cir. 1987). Nevertheless, a decision supported by
13 substantial evidence will be set aside if the proper legal standards
14 were not applied in weighing the evidence and making the decision.
15 *Brawner v. Secretary of Health and Human Services*, 839 F.2d 432, 433
16 (9th Cir. 1988).

17 **STATEMENT OF THE CASE**

18 Detailed facts of the case are set forth in the transcript of
19 proceedings (Tr.) and the ALJ's decision and are briefly summarized
20 here. Plaintiff was 55 years old at the time of the hearing. (Tr.
21 298.) She had a high school degree and an AAS in Office Technology.
22 (Tr. 62.) Plaintiff had past work experience as a full-time
23 babysitter for her two young grandchildren, and as an office helper.
24 (Tr. 299, 301.) She testified she could no longer work at these
25 jobs because of the "sitting down and the standing up"; she
26 indicated she could sit for about an hour and stand for about 15
27 minutes before needing to move around. (Tr. 300, 303-04.) She
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1 stated she needed to lie down two to three times a day to relieve
2 back pain. (Tr. 310.) She reported she cared for her personal
3 needs, cooked, cleaned and took care of her three year old grandson,
4 who lived with her full time because his mother was in South Dakota.
5 (Tr. 163.) Her twenty-five year old daughter, who has a daughter,
6 also lived with her and helped her with chores and the two children.
7 (Tr. 318.) Another daughter came in to help with chores. (Tr.
8 102.) Plaintiff's daughter reported that Plaintiff got the
9 granddaughter ready for school and took care of the grandson during
10 the day. (Tr. 95, 134, 318.) Plaintiff testified she also watched
11 television and read during the day. She has never driven a car.
12 (Tr. 309, 315.)

13 **ADMINISTRATIVE DECISION**

14 At step one, ALJ Payne found Plaintiff had not engaged in
15 substantial gainful activity since the onset of the disability. At
16 step two, he found Plaintiff had severe impairments of diabetes and
17 dysthymic disorder. (Tr. 14.) At step three, the ALJ found
18 Plaintiff's impairments or combination of impairments did not meet
19 or medically equal one of the listed impairments in 20 C.F.R. Part
20 404, Subpart P, Appendix 1 (Listings). (Tr. 15.) The ALJ found
21 that Plaintiff's statements regarding the limiting effects of her
22 impairments were "not entirely credible." (Tr. 17.) At step four,
23 he found the Plaintiff could perform a wide range of light level
24 work and could still perform her past relevant work as an office
25 worker. (*Id.*) He concluded Plaintiff had not been under a
26 disability, as defined by the Social Security Act, through the date
27 of the decision. (Tr. 18.)

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ISSUES

The question presented is whether the ALJ's decision is supported by substantial evidence and is free of legal error. Plaintiff argues that the ALJ erred when he: (1) improperly rejected the treating physician's opinion; (2) failed to properly evaluate her obesity as a severe impairment; and (3) improperly rejected Plaintiff's subjective symptom complaints. (Ct. Rec. 16 at 1-2.)

DISCUSSION

A. Obesity

Plaintiff's medical records and testimony indicate that she is 64 inches in height, her weight fluctuated between 290 and 301 pounds, and she had a Body Mass Index (BMI) of 45. (Tr. 291, 305.) She carries a diagnosis of obesity. (Tr. 176.) Her treating physician, cardiologist, the agency physician and medical expert noted her condition, and expressed concerns that her obesity was causing her limitations. She was advised consistently by medical providers to modify her lifestyle and lose weight. (Tr. 142, 164, 194, 204, 214, 217, 245, 295-96.) At 290 pounds with a BMI of 45, Plaintiff met the definition of Level III "extreme" obesity found in *Clinical Guidelines on the Identification, Evaluation, and Treatment of Overweight and Obesity in Adults*. *Social Security Ruling (SSR) 02-01p*; NIH Publication No. 98-4083 (September 1998). This level of obesity, however, "does not correlate with any specific degree of functional loss." *SSR 02-01p*.

While obesity has been eliminated as a Listing, it can constitute the equivalence of a Listing when considered with other severe and non-severe impairments. *Social Security Ruling* 02-01p

1 addresses the significance of obesity in the sequential evaluation
2 process. The ruling recognizes that obesity will constitute a
3 severe impairment when "it significantly limits an individual's
4 physical or mental ability to do basic work activities." SSR 02-
5 01p. The current prefaces to the musculoskeletal, respiratory and
6 cardiovascular body system Listings provide guidance about the
7 potential effects obesity has in causing or contributing to
8 impairments in those body systems. For example, Listing 4.04.00 I.1
9 states:

10 The combined effects of obesity with cardiovascular
11 impairments can be greater than the effects of each of the
12 impairments considered separately. We must consider any
13 additional and cumulative effects of obesity when we
determine whether you have a severe cardiovascular
impairment . . . (or a combination of impairments) . . .
and when we assess your residual functional capacity.

14 Obesity must be considered at step four of the process because
15 it may cause limitation of function. An assessment should be made
16 of the effect obesity has upon the individual's ability to perform
17 routine movement and necessary physical activity within the work
18 environment. SSR 02-01p. Here the ALJ did not adequately consider
19 Plaintiff's obesity at step two, three or four of the sequential
20 process. "An individualized assessment of the impact of obesity on
21 an individual's functioning" is required in the sequential
22 evaluation process. *Id.* A failure to consider obesity is
23 reversible error. On remand, the ALJ will consider the limitations
24 caused by Plaintiff's obesity in combination with severe and non-
25 severe impairments and the effects of pain. 20 C.F.R. §§ 416.911,
26 .923, .945(e).

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1 **B. Step Four Findings**

2 Although the burden of proof lies with the claimant at step
3 four, the ALJ still has a duty to make the requisite factual
4 findings to support his conclusion that the claimant can still
5 perform past relevant work. SSR 82-62. This is done by looking at
6 the "residual functional capacity and the physical and mental
7 demands" of the claimant's past relevant work. 20 C.F.R. §§
8 404.1520(a)(4)(iv) and 416.920(a)(4)(iv). In finding that an
9 individual has the capacity to perform a past relevant job, the
10 decision must contain among the findings the following specific
11 findings of fact:

12 1. A finding of fact as to the individual's residual
13 functional capacity;

14 2. A finding of fact as to the physical and mental demands of
15 the past job/occupation; and

16 3. A finding of fact that the individual's residual
17 functional capacity would permit a return to his or her past job or
18 occupation. SSR 82-62.

19 These findings must be based on the evidence in the record and
20 must be developed and fully explained in the disability decision.
21 Evidence of the physical and mental requirements of a particular job
22 may be found in the DICTIONARY OF OCCUPATIONAL TITLES, other
23 administratively recognized publications, or vocational expert
24 testimony. SSR 82-61. Vocational experts are used most often at an
25 ALJ hearing for reliable occupational information. SSR 00-4p. Step
26 four requires specific findings on all three points sufficient "to
27 insure that the claimant really can perform his past relevant work."

1 *Pinto v. Massanari*, 249 F.3d 840, 845 (9th Cir. 2001); see also SSR
2 00-4p.

3 "Past relevant work" is defined as work performed in the last
4 15 years, lasted long enough to learn it and was substantial gainful
5 employment. 20 C.F.R. § 416.960(b). Plaintiff reported she worked
6 in an office at her school where she did typing, filing, faxing,
7 errands and answering the phone for five months in 1997-98, and was
8 paid six dollars an hour. (Tr. 57.) The earnings report in the
9 record indicate Plaintiff earned \$3,339 in 1998 from United Tribe
10 Technical College. (Tr. 53.) On remand, the ALJ will explain the
11 basis for a finding that this represents "past relevant work" as
12 defined by the Regulations.

13 The regulations state "[f]inding that a claimant has the
14 capacity to do past relevant work on the basis of a generic
15 occupational classification of the work is likely to be fallacious
16 and unsupportable." SSR 82-61. Here, the ALJ did not consider
17 Plaintiff's obesity in combination with other impairments in his RFC
18 determination and did not make the required findings at step four.
19 There is no vocational expert testimony or even a reference to the
20 DICTIONARY OF OCCUPATIONAL TITLES to support the ALJ's conclusion that
21 Plaintiff could perform her past work as an office worker as actually
22 or generally performed. Plaintiff's brief description of her office
23 work at the hearing and in the record is not substantial evidence to
24 support the Commissioner's step four determination. This is
25 reversible error. See *Pinto*, 249 F.3d at 845 (reliance on the
26 DICTIONARY OF OCCUPATIONAL TITLES alone was not sufficient basis for a
27 finding that claimant can perform past relevant work).

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CONCLUSION

The ALJ's determination is not free of legal error and not based on substantial evidence. On remand, after consideration of obesity in combination with other severe and non-severe impairments, the ALJ will make new credibility findings and RFC findings. Plaintiff may submit additional evidence and vocational expert testimony may be obtained at step four and five, if necessary. Accordingly,

IT IS ORDERED:

1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 15**) is **GRANTED**. The ALJ's decision is **REVERSED** and the matter is **REMANDED** to the Commissioner for additional proceedings pursuant to sentence four 42 U.S.C. 405(g).

2. Defendant's Motion for Summary Judgment (Ct. Rec. 20) is
DENIED.

3. Application for an award of attorney fees may be made by separate motion.

3. Judgment for the **PLAINTIFF** shall be entered. The District Court Executive is directed to enter this Order, forward copies to counsel, and thereafter shall close this file.

DATED May 13, 2008.

S/ CYNTHIA IMBROGNO
UNITED STATES MAGISTRATE JUDGE